RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RENE SANCHEZ-GOMEZ, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* SENATOR JEFF FLAKE, THE NATIONAL SHERIFFS' ASSOCIATION, THE WESTERN STATES SHERIFFS' ASSOCIATION, AND THE ARIZONA SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THIS CASE IS AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE NINTH CIRCUIT'S NOVEL COURT-ROOM-SECURITY GUIDELINES	5
II. THE DECISION BELOW HAS HOBBLED LAW ENFORCEMENT AT ALL LEVELS IN ARIZONA, PUTTING THE SAFETY OF COURT PERSONNEL AND THE PUBLIC AT RISK	8
A. The Decision Below Will Continue to Strain Law Enforcement Resources in Arizona	8
B. The Decision Below Will Prevent Effective Border Enforcement Through Programs Like Operation Streamline	13
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page(s)

Deck v. Missouri,
544 U.S. 622 (2007) 6

In re Zermeno-Gomez,
—F.3d—, No. 17-71867, 2017 WL
3678174 (9th Cir. Aug. 25, 2017) 6, 7

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012) 7

United States v. Howard,
480 F.3d 1005 (9th Cir. 2007) 6

United States v. Sanchez-Gomez,
859 F.3d 649 (9th Cir. 2017) ..... *passim*

Wedbush, Noble, Cook, Inc. v. SEC,
714 F.2d 923 (9th Cir. 1983) 7

STATUTES

8 U.S.C. § 1326 15

OTHER AUTHORITIES

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES DISTRICT COURTS – NATIONAL JUDICIAL CASELOAD (2016), *available at* http://www.uscourts.gov/sites/default/files/data_tables/stfj_d3_630.2016.pdf 11

U.S. Department of Justice, *State of the Border Press Conference*, Feb. 22, 2008 ... 14

TABLE OF AUTHORITIES—Continued

Page(s)

James Gilbert, *Yuma Sector one of border's most secure: 126-mile stretch has seen sharp decline in apprehensions since 2005*, YUMA SUN, http://www.yumasun.com/news/yuma-sector-one-of-border-s-most-secure/article_6802d31e-0d51-11e4-8418-001a4bcf6878 .html (July 16, 2014).... 14

U.S. Border Patrol Fiscal Year 2011 Statistics, HOMELAND SECURITY DIGITAL LIBRARY, https://www.hsdl.org/?view&did=734591 (last visited Sept. 26, 2017)..... 14-15

U.S. Border Patrol, Sector Profile – Fiscal Year 2015, https://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2015%20sector%20profile.pdf (last visited Sept. 26, 2017)..... 15

INTEREST OF *AMICI CURIAE*[1]

Jeff Flake is a United States Senator from the State of Arizona. Elected to the Senate in 2012, he previously represented the people of Arizona's 1st and 6th Congressional Districts from 2001 until assuming his seat in the Senate in 2013. He is a member of the United States Senate Committee on the Judiciary and its Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts. As one of two elected senators from Arizona, Senator Flake has an interest in the court-safety rules established by the Ninth Circuit, which has jurisdiction over Arizona, and the effects these rules have on law-enforcement within the State. In particular, Senator Flake is concerned about the effects of these rules on successful immigration-enforcement programs long underway in Arizona.

The National Sheriffs' Association (NSA) is a professional association dedicated to serving the Office of Sheriff and its affiliates through police education, police training, and general law enforcement information resources. NSA represents thousands of sheriffs, deputies and other law enforcement, public safety professionals, and concerned citizens nationwide. It maintains a vast network of law enforcement information which enables criminal

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* and their counsel, no party has made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief and were notified 10 days prior to the filing of the brief of amici's intention to file.

justice professionals to locate information and programs they need. Court security training is among the services the NSA provides.

The Western States Sheriffs' Association is comprised of the sheriffs—who are elected officials and chief law enforcement officers—from fifteen western States: Washington, Wyoming, Oregon, Utah, Idaho, California, Arizona, Nevada, New Mexico, North Dakota South Dakota, Colorado, Montana, Texas and Oklahoma. The Association's mission is to assist these sheriffs and their offices with federal and state legislative issues, address policy and procedural matters, and develop guidelines to promote uniformity in matters important to sheriffs in the western United States.

The Arizona Sheriffs' Association is an organization comprised of all fifteen elected county sheriffs in Arizona. Among the many duties of Arizona sheriffs' personnel are to preserve the peace; to attend all county courts when requested by the presiding judge; to take charge of and keep the county jails and their prisoners; and to transport prisoners to court.

Because most of the nation's 3,088 Departments or Offices of Sheriff operate and administer local jails and detention centers, transport prisoners, and maintain courtroom security, this case is of major importance to America's sheriffs. All of the Sheriffs' Offices and Departments represented by these associations will be deeply affected by the ruling in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit upended traditional courtroom-security protocols last May when it held that routine prisoner-restraint practices violated the Constitution. In *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017), the court of appeals concluded that the U.S. District Court for the Southern District of California must grant all prisoners constitutional protections that traditionally applied only in the context of jury trials. Doing so overrode that court's reasonable courtroom-security measures, established by its Marshal and its judges. While the court of appeals declined to issue a writ of mandamus against the District Court, it made itself clear in San Diego—and throughout the Ninth Circuit—that it would no longer tolerate the commonplace courtroom-security practices of high-volume criminal jurisdictions.

The District of Arizona is one of the highest-volume criminal jurisdictions in the Ninth Circuit and nationwide. The District of Arizona saw 6,655 criminal filings in the twelve months that ended in June 30, 2016, the third most in the country. Because of this caseload, the District of Arizona's Marshals made 84,150 prisoner productions in its courtrooms last year (that is the number of times the Marshals had to bring a prisoner to appear in court).

Yet this summer the Ninth Circuit instructed the District of Arizona that it has been shouldering these tremendous burdens all wrong. Indeed, just last month the court of appeals issued a writ of mandamus against the District of Arizona. Astonishingly, this is not because the District was in violation of the Ninth Circuit's newly minted courtroom-security principles, but because one day it *might* be.

The effects of these new directives from the Ninth Circuit have been severe and detrimental to law enforcement within Arizona. At the federal level they have forced the U.S. Marshals Service to divert extremely scarce manpower into maintaining courtroom security in our Phoenix, Tucson, Yuma, and Flagstaff courthouses. These are men and women who are no longer available to catch fugitives, protect judges, or coordinate with state and local law enforcement to combat violent crime.

At the local level sheriffs and police departments are only now coming to terms with the Ninth Circuit's blindsiding new requirements. Because this is a constitutional rule that the court of appeals announced, its ruling on how federal courthouses in San Diego are run will affect how prisoner-safety is managed throughout Arizona, from Lake Havasu down to Sierra Vista. The court is, thus, not only incorrectly applying a constitutional precept to non-trial situations, but also infringing on law enforcement practices that local law enforcement is best equipped to assess on the front lines.

Lastly, the decision below could disrupt the long-standing and successful Operation Streamline border-enforcement program. Operation Streamline's "zero tolerance" approach to border crossing has proven an effective deterrent where implemented, but it requires processing so many illegal entrants that it would be very difficult to continue efficiently under the Ninth Circuit's new courtroom-security rules.

The reasonable allocation of law-enforcement resources is best left to state and federal executives and legislators as partners with the affected members of the judiciary. It is not best left to six judges out of 25 on a court of appeals, articulating a novel and

flawed constitutional doctrine. This case warrants certiorari.

ARGUMENT

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE NINTH CIRCUIT'S NOVEL COURTROOM-SECURITY GUIDELINES.

The posture of this case is unusual, but it is still an appropriate vehicle for certiorari. The oddity of the case's history stems from lower-court decisions, not from any fault of the Government or of the many political jurisdictions now affected by the *Sanchez-Gomez* opinion.

The Government demonstrates effectively in its Petition—as did Judge Ikuta in her dissent below—that the case was moot, and that fact alone should have prevented the Ninth Circuit's opinion. Nevertheless, the Ninth Circuit soldiered on, in spite of mootness, and proceeded to strike down the courtroom-security protocols in the Southern District of California. It did so through creative legal theories and procedural sleight-of-hand.

First, after the Ninth Circuit recognized that it lacked appellate jurisdiction, the court concluded that mandamus relief was "otherwise appropriate," though no lower court had abused its discretion or defied a prior ruling. *Sanchez-Gomez*, 859 F.3d at 655. That is, its supervisory power over lower courts could be invoked preemptively.

Next, where the Ninth Circuit agreed that the original claims for relief were moot, it invented the concept of a "functional class action" so it could keep the case on life support. *Id.*

Oddest of all, the Ninth Circuit failed to issue a writ of mandamus in order to resolve the "functional class action." After overturning a prior decision, *United States v. Howard*, 480 F.3d 1005 (9th Cir. 2007), misapplying Supreme Court precedent, *Deck v. Missouri*, 544 U.S. 622 (2007), and holding widespread courtroom-security practices unconstitutional, the court simply refused to issue a writ. This bafflingly implies that the prevailing party (the "functional class") lost and the losing party (the Government) prevailed. This is Federal Courts as practiced in Alice's Wonderland.

The fact is that the Government did lose. The court made it clear that the writ, if not issued, was threatened. According to the majority, "[t]he policy that defendants challenged here isn't presently in effect. Thus, although we hold that policy to be unconstitutional, we withhold the issuance of a formal writ of mandamus at this time." *Sanchez-Gomez*, 859 F.3d at 666. What if the policy were still in effect? From this it's only reasonable to infer that the writ would then issue.

Dicta with a threat is not mere dicta. The effect of a threatened ruling is not really different from a ruling. By holding a widespread procedure unconstitutional and expressing a desire to enforce it in the future, the Court effectively handed down a ruling that ought to be appealable.

In Arizona we know the Ninth Circuit's threats weren't idle. While *Sanchez-Gomez* didn't result in a writ against the Southern District of California, subsequent litigation *has* resulted in a writ of mandamus issued against the District of Arizona. *In re Zermeno-Gomez*, —F.3d—, No. 17-71867, 2017 WL 3678174 (9th Cir. Aug. 25, 2017). There the Ninth

Circuit expressly rejected the position of multiple judges in the District of Arizona that *Sanchez-Gomez* was not binding circuit precedent because of its procedural irregularity. As the court of appeals described the objection, "Citing the stay of the mandate, several judges within the District of Arizona found that *Sanchez-Gomez* was not binding on them . . . . A court-established committee tasked with providing a recommendation on how to comply with *Sanchez-Gomez* likewise concluded that no action was required until the mandate issued." *Id.* at *1.

The Ninth Circuit disagreed. It explained that its published decision is what binds, not the writ. "Under our 'law of the circuit doctrine,' a published decision of this court constitutes binding authority 'which must be followed unless and until overruled by a body competent to do so.'" *Id.* at *2 (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012)) (internal quotation marks omitted). Therefore "we have held that a stay of the mandate does not 'destroy the finality of an appellate court's judgment,' and that a published decision is 'final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.'" *Id.* (quoting *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983)). Because it "constitute[s] clear error for a district court to disregard a published opinion of [the court of appeals]," *id.* at *3, the Ninth Circuit issued a writ against the District of Arizona so that it would "comply with [the] decision in *Sanchez-Gomez* . . . ." *Id.* at *4.

The consequence of all this is that, while there may be no such thing as a "functional class action," the court has created a "functional writ of mandamus." And that functional writ is all too real in the District of Arizona where the judges are currently under

mandate from *Zermeno-Gomez* to ensure compliance with *Sanchez-Gomez*, because "a published decision constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so." *Zermeno-Gomez*, —F.3d at *3. This Court is that competent body.

II. THE DECISION BELOW HAS HOBBLED LAW ENFORCEMENT AT ALL LEVELS IN ARIZONA, PUTTING THE SAFETY OF COURT PERSONNEL AND THE PUBLIC AT RISK.

The *Sanchez-Gomez* opinion's effects on law enforcement in Arizona have been dramatic. Many law-enforcement agencies are only now coming to terms with its full implications. Two problems stand out for law enforcement in Arizona: first, the decision puts an unreasonable strain on law-enforcement resources; second, the decision handicaps future implementation of Operation Streamline, a successful immigration-enforcement program along Arizona's southern border.

A. The Decision Below Will Continue to Strain Law Enforcement Resources in Arizona.

Prior to the opinion in *Sanchez-Gomez*, the assessment of appropriate courtroom security in Arizona was primarily made by appropriate law enforcement—the Marshals in federal court and sheriffs and local police for Arizona courts. Now these assessments are being made by federal and state courts in an effort to divine what security would be allowable under the exacting and novel standards of the Ninth Circuit.

In the District of Arizona, the Chief Judge issued guidelines to establish court-wide compliance with *Sanchez-Gomez*.[2] The result is that the Marshals in Arizona are stretched to the bone. Now, even before a criminal defendant's first appearance in court, the Marshals must coordinate with the judge's chambers to assist the judge in making an individualized determination as to whether the defendant should be restrained in the courtroom and, if so, what level of restraint is necessary. The Marshals are responsible for providing to the judge "notations" from the U.S. Marshal Service (USMS)'s internal detainee database demonstrating a potential safety concern, though the judge may in his discretion choose to disregard the Marshals' input.

Once the judge has made an individualized determination regarding each detainee's restraint level, the Marshals must record that information in the detainee's file on the USMS database and produce each detainee according to the unique restraint level determined by the judge. That restraint level, however, is only required for the detainee's in-court appearance before the judge. Detainees remain fully restrained in compliance with USMS procedure when being transported to and from court to avoid legitimate safety risks—risks that the Ninth Circuit in *Sanchez-Gomez* puzzlingly decided are no longer legitimate after stepping inside the courtroom.

During the hearing the judge may reconsider a detainee's restraint level upon either party's request.

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[2] Indeed, the reason why the Ninth Circuit put the District Court under mandate was to ensure those guidelines stay in place. "If we decline to grant this petition and terminate the injunction, the Chief Judge could decide to withdraw the memorandum," it explained. *Zermeno-Gomez*, —F.3d at *3.

If the judge chooses to instantly modify the restraint level based on the detainee's in-court presence on that day, the judge then requires the Marshals to adjust the restraints accordingly. So, even if a judge initially determines that a detainee requires full restraint based on the judge's belief that valid safety concerns specific to that individual exist, the judge may change her mind if she is persuaded in the moment that a lesser level of restraint—including no restraint—is sufficient. Due to the high safety risks involved, modifying a detainee's restraints requires more Marshals and more time.

Restrained and unrestrained detainees are generally not permitted to appear in the same court proceeding. This means the Marshals are required to sort the detainees based on restraint level before the hearing. If the judge modifies a detainee's restraint level during the hearing, the Marshals need *additional* staff on hand to either adjust the detainee's restraints or remove the detainee from the courtroom entirely if the modification would result in restrained and unrestrained detainees being in the same proceeding.

Throughout this process the Marshals' time is spent on layer upon layer of administrative functions and not on assessing and avoiding actual security concerns. Their personnel and resources are stretched thin, and their safety is at greater risk.

These extra procedures create an acute problem in the District of Arizona because it has one of the busiest criminal dockets in the country. The District of Arizona saw 6,655 criminal filings in the twelve

months that ended on June 30, 2016.[3] This is the third highest number in the country (behind only the Southern and Western Districts of Texas, which are at 7,236 and 7,007).[4] That represents 193% more criminal filings than the Southern District of California and over 110% more filings than all of California *combined*.[5]

This packed docket means Arizona has some of the busiest Marshals. We are told that in FY2015 the Marshals for the district made 90,115 prisoner productions (that is the number of times the Marshals had to bring a prisoner to appear in court). For FY2016 that number was 84,150. As of this writing they have produced almost 80,000 for FY2017. With such a constant torrent of prisoner productions, any changes in how the Marshals need to conduct courtroom security seriously affect their manpower and efficacy.

Of course the opinion below, relying on a question of constitutional law, also applies to state and local government, and it is having a similar impact on non-federal law enforcement. Stories from Arizona's counties illustrate this.

In Yuma County, on the Mexican border, *Sanchez-Gomez* has already presented troubling challenges to public safety. There have been eight cases in Yuma where defendants outside of a trial setting challenged courtroom-security practices. A successful such challenge involved an arraignment for first-degree murder

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[3] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES DISTRICT COURTS – NATIONAL JUDICIAL CASELOAD (2016), *available at* http://www.uscourts.gov/sites/default/files/data_tables/stfj_d3_630.2016.pdf.

[4] *Id.*

[5] *Id.*

before which the defendant had been classified as a risk and whom the court had already concluded was ineligible for release into the community at a Conditions of Release hearing. Yet under *Sanchez-Gomez* he was unrestrained.

In Graham County there have been prior occasions when presiding judges have overridden law-enforcement determinations on courtroom-security practices only to have defendants charge the bench.

In Mohave County—and throughout the State—there is serious concern that law enforcement now faces unreasonable new burdens. Most state law-enforcement agencies operate in older court facilities—indeed many state courthouses are historic—very few of which were ever designed to accommodate the demands of contemporary law enforcement. The result is that in a large number of courthouses, detained prisoners have no choice but to use the same entrances, exits, and hallways as the general public, sometimes including victims. The obvious effect of *Sanchez-Gomez*, then, will be to require more officers to maintain an expected level of courtroom security over an ever-increasing number of prisoners with less certain safety for the public.

The Yavapai County Jail serves as the pre-trial detention center for 26 courts. On certain days of the week, the Yavapai County Sheriff's Office must transport 60–70 inmates with different safety classifications over 40 miles from the detention center in Camp Verde to the courthouse in Prescott. The volume of prisoners coupled with the distances Sheriff's Office personnel need to cover can result in officers having to supervise up to thirty inmates at a time in a given courtroom—all with different safety classifications. In order to manage this situation without the use of

restraints, the Sheriff's Office would need to hold all the prisoners in their Prescott intake facility and transport individual prisoners to court only when ready to appear before their respective judges. The county simply lacks the law-enforcement resources for such a cumbersome, labor-intensive, and time-consuming courtroom-safety plan.

The opinion creates a particular problem for state and local government. As the Government noted in its Petition, local governments typically don't have the luxury of a specialized court-security agency, like the Marshals. Resources spent by Sheriffs on courtroom security and prisoner transport are necessarily taken from their general law-enforcement and public-safety activities.

As often occurs when a court tries to act like a "super law-enforcement agency" without law-enforcement training, Arizona's sheriffs and police are left with the choice of risking the safety of their men and women in uniform or risking the threat of costly litigation. Heads, the Ninth Circuit wins; tails, Arizona's law enforcement loses.

B. The Decision Below Will Prevent Effective Border Enforcement Through Programs Like Operation Streamline.

Lastly, the *Sanchez-Gomez* decision impedes the future activities of Operation Streamline (OSL).

OSL is an effective border-control program. Established in 2005, the program achieves its goals by adopting a "zero-tolerance" approach to illegal border entry by prosecuting illegal border crossers criminally. The intent of the program was to reduce border-crossing recidivism by expeditiously prosecuting those entering or reentering illegally.

Former Secretary of Homeland Security, Michael Chertoff, said that OSL

> has an unbelievable return . . . . What we see, both statistically and anecdotally, is that when people who cross the border illegally are brought to face the reality that they are committing a crime, even if it is just a misdemeanor, that has a huge impact on their willingness to try again and on the willingness of others to break the law coming across the border.

U.S. Department of Justice, *State of the Border Press Conference*, Feb. 22, 2008.

OSL has largely been credited with helping achieve effective control in the Border Patrol Yuma Sector, which saw a 95% decrease in crossings after implementing the program. It was because of policies like OSL that the *Yuma Sun* noted, "the Yuma Sector's border with Mexico has gone from being one of the busiest and most dangerous in the nation to one of the most secure." James Gilbert, *Yuma Sector one of border's most secure: 126-mile stretch has seen sharp decline in apprehensions since 2005*, YUMA SUN, http://www.yumasun.com/news/yuma-sector-one-of-border-s-most-secure/article_6802d31e-0d51-11e4-8418-001a4bcf6878.html (July 16, 2014).

The results in Yuma speak for themselves. In 2005, prior to the start of OSL, there were 140,000 apprehensions in the Yuma Sector of the southern border. After 10 years of OSL, in FY2015, there were only 7,142 apprehensions.[6]

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[6] *Compare* U.S. Border Patrol Fiscal Year 2011 Statistics, HOMELAND SECURITY DIGITAL LIBRARY, https://www.hsdl.org/

Under OSL illegal border crossers are immediately processed and charged, no excuses. Aliens in OSL fall into two categories: aliens with prior removals and aliens without prior removals.

If an illegal entrant has been removed before, then he faces two charges. The first is illegal reentry of a removed alien, 8 U.S.C. § 1326, a felony punishable by up to 2 years, 10 years or 20 years imprisonment depending on the alien's prior criminal record in the U.S. He also faces a second count of illegal entry, a misdemeanor that carries up to 6 months imprisonment. This group of illegal entrants enters into plea agreements with federal prosecutors and the sentencing range is 30 to 180 days.

The second category of OSL aliens consists of those aliens who have not been removed. They do not enter into plea agreements but almost always plead guilty. These illegal entrants are typically sentenced to time-served because they often lack a prior criminal record and it is their first illegal entry. Nevertheless, pleading guilty expedites their removal and lays the foundation for a felony charge should they return—thus deterring recidivism.

In order to process the sheer volume of pleas, OSL defendants enter their pleas in open court together in large groups. Illegal entrants from all backgrounds—the peaceable and the violent, the first-time, and the hardened—assemble together in a public courtroom with all the security concerns that necessarily presents. This can only be done efficiently by employing

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?view&did=734591 *with* U.S. Border Patrol, Sector Profile – Fiscal Year 2015, https://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2015%20sector%20profile.pdf.

traditional courtroom-security practices, such as restraints.

The story from Tucson last week is instructive. On September 21, 2017, a Magistrate Judge in Tucson accepted 63 guilty pleas from illegal entrants. On September 20, he accepted 58. On September 18, he accepted 47. These are large numbers but they are not capacity, which is 75 persons for an OSL proceeding, and they represent a recent uptick. According to conversations with the District's Clerk, the average number of illegal entrants for an OSL hearing this year has ranged from 23 in April to 68 in September, with an average for the year around 45 per month. The court is able to manage the upper-end of these numbers by holding the entrants in custody and slowly processing them in small groups at a time.

There is, nevertheless, uncertainty regarding what would happen if the program were expanded. While the court has been able to accommodate a few OSL hearings a week, it's not clear how much more the court can sustain. Each of these hearings already takes time, space, and support from court staff and Marshals. It is simply not clear that Tucson has the courtroom space, personnel, or hours in the day to implement a full zero-tolerance program consistent with *Sanchez-Gomez*, and to do so in a manner that is safe for the illegal entrants and courtroom staff.

OSL is a critical border-enforcement tool that has a proven track record of success. It should not be sidelined by overly broad and novel constitutional rules that do not take into consideration the legitimate safety needs of individual courts, judges, and law-enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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